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No. 88-1897

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

MICHIGAN DEPARTMENT OF STATE POLICE, *et al.*,
Petitioners,

v.

RICK SITZ, *et al.*,
Respondents.

On Writ of Certiorari to the Michigan Court of Appeals

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE SUPPORTING NEITHER PARTY

WALTER KAMIAT
LAURENCE GOLD
(Counsel of Record)
815 16th Street N.W.
Washington, D.C. 20006
(202) 637-5340

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TABLE OF CONTENTS

	Page
INTRODUCTION AND SUMMARY OF ARGUMENT	2
ARGUMENT	6
I. The Fourth Amendment Requires That Suspicionless Search or Seizure Programs Be No More Than Minimally Intrusive Into Privacy and Dignity Interests	6
II. The Role of the Minimal Intrusiveness Requirement In Evaluating Suspicionless—and Especially Random—Searches or Seizures	11
III. Reviewing Highway Sobriety Checkpoint Programs To Assure That They Impose No More Than Minimal Intrusions	17
CONCLUSION	20

TABLE OF AUTHORITIES

CASES

	Page
Almeida-Sanchez v. United States, 413 U.S. 266 (1973)	*passim*
Brinegar v. United States, 338 U.S. 160 (1949)	7
Brown v. Texas, 443 U.S. 47 (1979)	6, 9, 13
Carroll v. United States, 267 U.S. 132 (1925)	14, 18
Commonwealth v. Amaral, 495 N.E.2d 276 (Mass. 1986)	19
Commonwealth v. Trumble, 483 N.E.2d 1102 (Mass. 1985)	17
Delaware v. Prouse, 440 U.S. 648 (1979)	*passim*
Duniway v. New York, 442 U.S. 200 (1979)	8
Griffin v. Wisconsin, —— U.S. ——, 55 U.S.L.W. 5156 (June 23, 1987)	10
National Treasury Employees Union v. von Raab, —— U.S. ——, 57 U.S.L.W. 4338 (March 21, 1989)	*passim*
New Jersey v. T.L.O., 469 U.S. 325 (1985)	*passim*
O'Connor v. Ortega, 480 U.S. 709 (1987)	10, 16
Olmstead v. United States, 277 U.S. 438 (1928)	7
Patchogue-Medford Teachers Cong. v. Board of Education, 510 N.E.2d 325 (NY 1987)	17
People v. Scott, 473 N.E.2d 1 (NY 1984)	17
Schmerber v. California, 384 U.S. 757 (1966)	7
Skinner v. Railway Labor Executives' Association, —— U.S. ——, 57 U.S.L.W. 4324 (March 21, 1989)	*passim*
South Dakota v. Opperman, 428 U.S. 364 (1976)	16
Stark v. Perpich, 590 F. Supp. 1057 (D. Minn. 1984)	18
State v. Deskins, 673 P.2d 1174 (Kan. 1983)	19
State v. Hillesheim, 291 N.W.2d 314 (Iowa 1980)	19
State v. Superior Court, 691 P.2d 1073 (Ariz. 1984)	17
Terry v. Ohio, 392 U.S. 1 (1968)	12
United States v. 12 200-Ft. Reels of Film, 413 U.S. 123 (1973)	8
United States v. Brignoni-Ponce, 422 U.S. 873 (1975)	2

TABLE OF AUTHORITIES—Continued

	Page
United States v. Martinez-Fuerte, 428 U.S. 543 (1976)	*passim*
United States v. Maxwell, 565 F.2d 596 (9th Cir. 1977)	18
United States v. Ortiz, 422 U.S. 891 (1975)	*passim*
United States v. Place, 462 U.S. 696 (1983)	11
Webb v. State, 739 S.W.2d 802 (Tex. Cr. App. 1987)	19
Winston v. Lee, 470 U.S. 753 (1985)	7, 9
Wyman v. James, 400 U.S. 309 (1971)	12

MISCELLANEOUS:

Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349 (1974)	9
Coast Guard, *Programs for Chemical Drug and Alcohol Testing of Commercial Vessel Personnel*, 53 Fed. Reg. 47064 (November 21, 1988)	3
Department of Defense, *Federal Acquisition Regulation Supplement; Drug-Free Work Force*, 53 Fed. Reg. 37763 (September 28, 1988), supplemented by *Questions and Answers Prepared by Defense Department on Drug Free Workplace Regulations for Federal Contractors*, BNA Daily Labor Report, April 10, 1989 at G-1	2
Federal Aviation Administration, *Anti-Drug Program for Personnel Engaged in Specified Aviation Activities*, 53 Fed. Reg. 47024 (November 21, 1988)	3
Federal Highway Administration, *Controlled Substance Testing*, 53 Fed. Reg. 47134 (November 21, 1988)	3
Federal Railroad Administration, *Random Drug Testing; Amendments to Alcohol/Drug Regulations*, 53 Fed. Reg. 47102 (November 21, 1988)	3
Jacobs & Strossen, *Mass Investigations Without Individualized Suspicion*, 18 U.C. Davis L.R. 595, 672 (1985)	18

TABLE OF AUTHORITIES—Continued

	Page
Office of Workplace Initiatives, National Institute on Drug Abuse, *Report to Congress: Federal Agency Drug-Free Workplace Programs, Tier I Agencies* (March 29, 1988)	3
Research and Special Programs Administration, *Control of Drug Use in Natural Gas, Liquified Natural Gas and Hazardous Liquid Pipeline Operations*, 53 Fed. Reg. 47084 (November 21, 1988)	3
Urban Mass Transportation Administration, *Control of Drug Use in Mass Transportation Operations*, 53 Fed. Reg. 47156 (November 21, 1988)	3

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE SUPPORTING NEITHER PARTY

This brief *amicus curiae* of the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO")—a federation of 90 national and international labor organizations having a total membership of approximately 14 million working men and women—is filed with the consent of the parties, and in support of neither party, as provided for in the Rules of this Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

The highway sobriety checkpoint program in question in this case involves government seizures of individual motorists in the absence of any individualized suspicion that the individuals have committed any wrong or pose any threat to the safety of others and, indeed, in the absence of any discrete event that might serve as a basis for making them the target of special government inquiries. Put simply, the individuals to be seized in this program are to be randomly selected from among those who are pursuing their normal, lawful, seemingly uneventful, every-day activities: in the instant case, from among those who are simply driving their cars on a public highway. This case, in other words, continues the trend in which the Court has examined the constitutionality of random personal search or seizure programs in the automobile stop context. *See, e.g., Delaware v. Prouse*, 440 U.S. 648 (1979); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976); *United States v. Ortiz*, 422 U.S. 891 (1975); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975); *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973).

At the outset, we freely acknowledge that the AFL-CIO has no specific organizational interest, or expertise, in the constitutionality of the highway sobriety checkpoint practices at issue here. The AFL-CIO does, however, have a strong interest and concern in the more general issue of how random programs of personal searches and seizures should be evaluated under the Fourth Amendment. Increasingly large sectors of the American work force—including those organized by AFL-CIO unions—are being subjected to governmentally-established programs of mandatory, random, repetitive, and often unannounced, urine collection drug testing.[1] AFL-CIO unions have, accordingly, been extensively involved in litigation challenging many of those programs as impermissibly intrusive under the Fourth Amendment. To date, this Court has only had occasion to examine certain *non-random* drug testing programs. *See Skinner v. Railway Labor Executives' Ass'n*, —— U.S. ——, 57 U.S.L.W. 4324 (March 21, 1989) (testing triggered by individual's involvement in accident or safety rule violation); *National Treasury Employees Union v. von Raab*, —— U.S. ——, 57 U.S.L.W. 4338 (March 21, 1989) (testing triggered by individual's application and receipt of sensitive government job). The Court has not yet examined the issue of mandatory *random* drug testing in any context.

[1] *See, e.g.*, Department of Defense, *Federal Acquisition Regulation Supplement; Drug-Free Work Force*, 53 Fed. Reg. 37763 (September 28, 1988), supplemented by *Questions and Answers Prepared by Defense Department on Drug Free Workplace Regulations for Federal Contractors*, BNA Daily Labor Report, April 10, 1989, at G-1 (requiring random drug testing of employees of defense contractors); Coast Guard, *Programs for Chemical Drug and Alcohol Testing of Commercial Vessel Personnel*, 53 Fed. Reg. 47064 (November 21, 1988) (requiring random drug testing of employees in commercial maritime industry); Federal Aviation Administration, *Anti-Drug Program for Personnel Engaged in Specified Aviation Activities*, 53 Fed. Reg. 47024 (November 21, 1988) (requiring random drug testing of employees in commercial aviation industry); Federal Highway Administration, *Controlled Substance Testing*, 53 Fed. Reg. 47134 (November 21, 1988) (requiring random drug testing of employees in motor carriage industry); Federal Railroad Administration, *Random Drug Testings; Amendments to Alcohol/Drug Regulations*, 53 Fed. Reg. 47102 (November 21, 1988) (requiring random drug testing of employees in railroad industry); Research and Special Programs Administration, *Control of Drug Use in Natural Gas, Liquified Natural Gas and Hazardous Liquid Pipeline Operations*, 53 Fed. Reg. 47084 (November 21, 1988) (requiring random drug testing of employees in pipeline industry); Urban Mass Transportation Administration, *Control of Drug Use in Mass Transportation Operations*, 53 Fed. Reg. 47156 (November 21, 1988) (requiring random drug testing of employees in urban mass transit industry); *see also* Office of Workplace Initiatives, National Institute on Drug Abuse, *Report to Congress: Federal Agency Drug-Free Workplace Programs, Tier I Agencies* (March 29, 1988) (describing extensive random drug testing programs governing over 300,000 federal employees).

Automobile sobriety checkpoint programs and urine collection drug testing programs both raise the issue of the constitutionality of random searches and seizures. (At the same time, each type of program implicates quite distinct personal privacy and dignity interests. *See, e.g., Skinner, supra*, 57 U.S.L.W. at 4330 (urine collection programs "require employees to perform an excretory function traditionally shielded by great privacy" and constitute personal searches that will "not [be] characterize[d] . . . as minimal [intrusions] in most contexts"); *von Raab, supra*, 57 U.S.L.W. at 4346 (urine collection drug tests are "much more intrusive than the stop of a car") (Scalia, J., dissenting). And the similarities are such that the general Fourth Amendment principles concerning random searches and seizures developed in this case will likely have a major influence on the development of law regarding random drug testing programs.

As framed by the parties and other *amici curiae* in this case, the debate has focused principally on the degree to which automobile sobriety checkpoints further the admittedly important government interest of deterring drunk driving. The issue of whether an "important government interest [is sufficiently] furthered" by the program in question, *Skinner v. Railway Labor Executives' Ass'n, supra*, 57 U.S.L.W. at 430, is admittedly an important one. But, as this Court has made clear, it is *not* the only issue. The Fourth Amendment evaluation of a random search program must also focus on the question of whether the program works any more than a *minimal* intrusion into individual privacy and dignity interests: if the program does so, the search does *not* pass constitutional muster. *See New Jersey v. T.L.O.*, 469 U.S. 325, 342 n.8; *Skinner v. Railway Labor Executives' Ass'n, supra*, 57 U.S.L.W. at 4330.[2]

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[2] Although the trial court below explicitly recognized this principle, Petition for *Certiorari* ("Petition"), Appendix ("Pet. App.") at 120a, and both courts below held that the checkpoint program

In this brief, we will explore the principle that the state may *not* constitutionally search or seize on a random basis where that would entail intrusions into personal dignity or privacy that are *not* minimal. In doing so we will focus on the proper framework for analyzing the nature and quantum of the intrusion into privacy worked by random search and seizure programs, rather than on the particular facts and circumstances of this case.

First, we will show that the issue of a program's intrusiveness is not merely one factor in the overall balancing of competing interests: rather, the "minimal intrusion" limitation is a constitutional precondition to any suspicionless search or seizure program.

Second, we will show that strict adherence to this "minimal intrusion" limitation is compelled by the entire structure of Fourth Amendment law; only through this limitation can any permission of suspicionless searches or seizures be reconciled with the remainder of Fourth Amendment doctrine in which *individualized suspicion requirements* define the only circumstances in which significant intrusions will be tolerated. Indeed, we will show that strict adherence to the minimal inclusion requirement is most essential in the context of *random* suspicionless programs, where the fact of randomness may itself substantially heighten the level of intrusion effected by a search or seizure beyond what it would otherwise be.

And, third, we will show that the "minimal intrusion" limitation has, in fact, been at the core of many of the lower court decisions regarding highway sobriety check-

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here created a potential for intrusions into individual dignity and privacy interests beyond a minimal level, Pet. App. at 21a-22a, 102a-119a, 123a-124a, this basic Fourth Amendment requirement, unfortunately, has, thus far, hardly been explored in any of the filings in this case.

point programs. The result is a body of case law that defines numerous safeguards that reduce the intrusiveness of checkpoint programs, and that are thus indispensable to the constitutionality of any such programs.

ARGUMENT

I. The Fourth Amendment Requires That Suspicionless Search or Seizure Programs Be No More Than Minimally Intrusive Into Privacy and Dignity Interests

A. Petitioners, in framing the issues presented for review, have proceeded on the premise that the constitutionality of random search and seizure programs is determined through an *ad hoc* balancing of the intrusiveness of the seizures in question against the important government interests the program is intended to further. Petition at 16-17 & 22 (citing *Skinner v. Railway Labor Executives' Ass'n*, *supra*, 57 U.S.L.W. at 4328 and *Brown v. Texas*, 443 U.S. 47, 50-51 (1979)). While petitioner is correct that these are the factors which the Fourth Amendment law considers—and (as the cited cases make clear) are thus important in locating the place of a given case in Fourth Amendment jurisprudence—the relevant constitutional doctrine provides far more definite guidelines than petitioner admits. This Court has made it clear that the constitutionality of any suspicionless search or seizure program turns on whether the program works no more than a minimal intrusion on personal privacy and dignity interests.

In *New Jersey v. T.L.O.*, *supra*, the Court explained that "[e]xceptions to the requirement of individualized suspicion are generally appropriate *only* where the privacy interests implicated are minimal." 469 U.S. 325, 342 n.8 (1985) (emphasis added). And, in *Skinner* the Court reaffirmed that "[i]n limited circumstances, *where the privacy interests implicated by the search are minimal* and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of [individualized] suspicion." 57 U.S.L.W. at 4330 (emphasis added). Accordingly, the degree of governmental intrusion into personal privacy interests is not simply one of a number of factors to be weighed in assessing whether a particular suspicionless search or seizure program is justified: rather, to be constitutionally valid suspicionless programs must be *no more than minimally intrusive*.

B. This "minimal intrusion" limitation on suspicionless searches and seizures is deeply grounded in basic Fourth Amendment doctrine. Rarely, if ever, does Fourth Amendment analysis weigh the personal privacy interests and the proffered state interests at issue on a case-by-case basis. Rather, in the main, the governing law consists of a limited number of "objective standards," each establishing the specific quantum of individualized suspicion necessary to sustain a search or seizure that entails a certain level of intrusion. It is precisely because search or seizure programs such as the one here rest on *no* individualized suspicion whatsoever—and are thus so exceptional in Fourth Amendment terms—that the programs have only been permitted where the intrusion into protected privacy interests is minimal.

1. The Fourth Amendment rests on this society's respect for the values of individual "human dignity and privacy," *Schmerber v. California*, 384 U.S. 757, 769-770 (1966), and this society's recognition that "[a]mong deprivations of rights, none is so effective in cowing a population [and] crushing the spirit of the individual'" as that accomplished through unreasonable searches and seizures. *Almeida-Sanchez v. United States*, 413 U.S. 266, 274 (1973) (quoting *Brinegar v. United States*, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting)). *See also Winston v. Lee*, 470 U.S. 753, 758 (1985) ("'the right to be let alone [is] the most comprehensive of rights and the right most valued by civilized men'") (quoting *Olm-*

stead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

2. It is in the nature of things that the individual privacy interests protected by the Fourth Amendment will often be juxtaposed to wholly legitimate—and, indeed, pressing and immediate—state interests, and that the searches or seizures in question will usually further the state interest to some degree. That being so, allowing significant governmental intrusion into personal privacy whenever doing so rationally serves an immediate state interest will, over time, produce a society in which the precious expectation of individual dignity and privacy is lost. As this Court stated:

> The needs of law enforcement stand in constant tension with the [Fourth Amendment's] protection of the individual against certain exercises of official power. It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards. [*Almeida-Sanchez v. United States*, *supra*, 413 U.S. at 273.]

Given this, case-by-case balancing of privacy and state interests in Fourth Amendment litigation will inevitably yield results in which "[e]ach step, when taken, appear[s] a reasonable step in relation to that which proceeded it, although the aggregate or end result [will be] one that would never have been seriously considered in the first instance." *United States v. 12 200-Ft. Reels of Film*, 413 U.S. 123, 127 (1973). "[T]he protections intended by the Framers could all too easily disappear in the consideration and balancing of the multifarious circumstances presented by different [Fourth Amendment] cases." *Duniway v. New York*, 442 U.S. 200, 213 (1979).

Indeed, in the Fourth Amendment area *ad hoc* balancing is particularly inappropriate, since the Amendment's purpose is to allow individuals to live their lives secure in their expectations of privacy. Such balancing fails to provide anyone—be they law enforcement officers whose

actions may intrude into privacy or citizens entitled to their privacy—with the clear prospective guidance necessary for the fostering of secure expectations. *See* Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 393 (1974) ("[I]f some categorization is not done, if the understandable temptation to be responsive to every relevant shading of every relevant variation of every relevant complexity is not restrained, then we shall have a fourth amendment with all of the character and consistency of a Rorschach blot.").

3. All this being so, this Court has proceeded by accommodating the competing interests at stake in Fourth Amendment litigation through a system of categories establishing "objective standard[s]" against which the facts allegedly justifying a particular intrusion into personal privacy can be measured. *Delaware v. Prouse*, *supra*, 440 U.S. at 654. These standards establish "some [specific] quantum of individualized suspicion [as] a prerequisite to a constitutional search or seizure." *United States v. Martinez-Fuerte*, *supra*, 428 U.S. at 560. It is by application of these standards to the case at hand that the courts have determined whether "specific, objective facts indicat[e] that society's legitimate interests [sufficiently] require the [search or] seizure of the particular individual." *Brown v. Texas*, *supra*, 443 U.S. at 51.

(a) As a general matter, the relevant "objective standard" is "probable cause," and a search or seizure is only permitted where there is a *high degree of likelihood* that the particular intrusion will uncover evidence which the community needs for its protection. Thus, where a serious intrusion into personal privacy is contemplated, "probable cause" marks the point at which it is "justifiable for the community to demand that the individual give up some part of his interest in privacy and security." *Winston v. Lee*, *supra*, 470 U.S. at 759. *See Skinner v. Railway Labor Executives' Assn'*, *supra*, 57 U.S.L.W. at 4328 ("[e]xcept in certain well-defined circumstances, a

search or seizure . . . is not reasonable unless it is accomplished pursuant to . . . probable cause").

(b) The Court has recognized, however, that in certain classes of cases involving "special needs, beyond the normal need for law enforcement," *Griffin v. Wisconsin*, —— U.S. ——, 55 U.S.L.W. 5156, 5158-5159 & n.4 (June 23, 1987), and involving only "a relatively limited invasion" of privacy, *O'Connor v. Ortega*, 480 U.S. 709, 725 (1987) (O'Connor, J.), searches may be found "reasonable" on a lesser quantum of individualized suspicion than "probable cause". But even in such cases "some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure." *United States v. Martinez-Fuerte*, *supra*, 428 U.S. at 560. In general, then, no search may be conducted in such "special needs" cases without a showing of "reasonable suspicion." *See, e.g.*, *O'Connor v. Ortega*, *supra* (public employer's search of public employee's desk); *New Jersey v. T.L.O.*, *supra* (teacher's search of student's locker).

(c) This case thus presents an extraordinary claim of government power: the claim of right to search or seize *in the absence of any individualized suspicion.* Operating within a constitutional system of objective standards that calibrate the government's right to intrude into personal privacy and dignity with the likelihood that the intrusion will provide the information the government needs to meet its obligations, the state here admits that its showing will *fail* the most forgiving of these standards.

That being so, the state should only be permitted to proceed where that permission does not undermine the Fourth Amendment's system of safeguards as a whole. And, as we have emphasized, the principal safeguard that this Court has established to prevent such an undermining is the requirement that "[e]xceptions to the requirement of individualized suspicion are generally appropriate *only* where the privacy interests implicated by a search are minimal." *New Jersey v. T.L.O.*, *supra*, 469

U.S. at 342 n. 8 (emphasis added). *Accord*, *Skinner v. Railway Labor Executives' Ass'n*, *supra*, 57 U.S.L.W. at 4330. That safeguard recognizes that to permit *significant* intrusions into personal privacy and dignity, in the absence of individualized suspicion justifying such intrusions, is inconsistent with our basic commitment to individual privacy and dignity.

II. The Role of the Minimal Intrusiveness Requirement In Evaluating Suspicionless—and Especially Random —Searches or Seizures

A. In assessing the intrusiveness of search or seizure programs, this Court has emphasized that each individual's recognized human dignity and privacy interests include her freedom to come and go as she pleases without being subjected to government restraints of any substantial temporal dimensions. The Fourth Amendment inquiry thus focuses, first, on the issue of "objective" intrusion: "the stop itself, the questioning, and the visual inspection." *United States v. Martinez-Fuerte*, 428 U.S. 543, 558 (1976); *Delaware v. Prouse*, *supra*, 440 U.S. at 656-657. A significant restraint on the individual's normal freedom of movement, standing alone, is generally sufficient to invoke the requirement of probable cause. *See, e.g., United States v. Place*, 462 U.S. 696, 709 (1983) ("length of detention of [airline traveler's] luggage alone precludes the conclusion that the seizure was reasonable in the absence of probable cause").

The Fourth Amendment also protects individuals from the apprehensions and annoyances entailed by government restraints, and thus the Fourth Amendment inquiry also focuses on the degree to which searches or seizures entail "subjective" or "psychological intrusions". *United States v. Martinez-Fuerte*, *supra*, 428 U.S. at 558; *Delaware v. Prouse*, *supra*, 440 U.S. at 657. The constitutional validity of a search or seizure may thus depend in part on its potential for causing reasonable individuals to feel annoyance, anxiety, fright, surprise, stigma, or embarrassment. *See Delaware v. Prouse*, *supra*, 440 U.S. at 657

("anxiety", "fright", "annoyance"); *United States v. Martinez-Fuerte*, *supra*, 428 U.S. 543, 558-560 ("concern", "surprise", "offense").[3] And, even a search or seizure that is exceedingly brief and limited in purpose may still be unconstitutional if carried out in a way that causes such subjective reactions. *See*, *e.g.*, *Delaware v. Prouse*, *supra*.

In this regard, the Court has stressed that intrusiveness is heightened when agents of the state are granted discretionary authority to invade personal privacy. "[T]he essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of 'reasonableness' upon the exercise of discretion by government officials . . . in order to safeguard the privacy and security of individuals against arbitrary invasions." *Id.* at 653-654. *See also id.* at 655 (Fourth Amendment "assure[s] that the individual's reasonable expectation of privacy is not [to be] subject to the discretion of the official in the field").

B. The office of the usual requirement of "some quantum of individualized suspicion," *United States v. Martinez-Fuerte*, *supra*, 470 U.S. at 759, is to limit the government's discretionary authority to search and seize. The basic questions of who may be searched or seized and, to a large degree, when, where, and how the search or seizure may occur are determined by circumstances having to do with the *individual and her actions*; and *not* circumstances within the control of the state. If and only if the individual excites a reason for governmental inquiry may the state act.

The individualized suspicion requirement protects an individual's subjective expectations of privacy as well. A valid search or seizure is, for most, a rare occurrence which occurs under circumstances which in themselves

[3] *See also United States v. Ortiz*, 422 U.S. 891, 894-895 (1975); *Wyman v. James*, 400 U.S. 309, 320 (1971) (significance of prior notice to reduce surprise); *Terry v. Ohio*, 392 U.S. 1, 25 (1968) ("humiliation").

demonstrate to the individual why she has been selected for scrutiny. Moreover, the individualized suspicion requirement limits not only the circumstances under which a search or seizure may be initiated but also the scope and details of the search or seizure throughout:

> Determining the reasonableness of any search involves a twofold inquiry: first, one must consider whether the . . . action was justified at its inception; second, one must determine whether the search as actually conducted was reasonably related in scope to the circumstances which justified the interference in the first place. [*New Jersey v. T.L.O.*, *supra*, 469 U.S. at 341.]

And, to the extent that the intrusions into personal privacy suffered by the individual are limited to what those circumstances justify, the intrusions can be understood as an exercise of sound government discretion which takes privacy interests into account rather than as an exercise of raw governmental power that degrades individual dignity.

C. Where searches are permitted in the absence of objective external facts giving rise to individualized suspicion, decent respect for Fourth Amendment values requires that the government be restricted by "other safeguards . . . to assure that the individual's reasonable expectations of privacy" are preserved. *Delaware v. Prouse*, *supra*, 440 U.S. at 655. In the absence of individualized suspicion, the state's discretion to intrude on particular individuals at particular times and in a particular manner must be so limited as to assure that the intrusion would be accepted as justified to a fair minded individual who suffers the intrusion. The Court has therefore determined that where individualized suspicion is not required searches and "seizures must be carried out pursuant to a plan embodying explicit, neutral limitations" on discretion, *Brown v. Texas*, *supra*, 443 U.S. at 51, and that the level of intrusion be no more than minimal,

New Jersey v. T.L.O., supra, 469 U.S. at 342 n.8. These burdens on the government in the context of random programs are—and should be—heavy ones.

D. By definition, where a random search and seizure is involved, there has been *no* discrete event that directs public inquiry toward the particular individual who will suffer the intrusion.[4] The individual has simply pursued her normal, lawful, daily activities and, for that reason, and the laws of chance, has become subject to a search or seizure. In this case, for example, citizens have become subject to seizure merely by driving on the public roads, an activity engaged in at some point by virtually the entire population.

Since this has been enough to "single out" the individual and subject her to intrusions by the government, the intrusion is likely to appear particularly arbitrary and offensive. And, since a common—rather than uncommon—event is the basis for subjecting the individual to these intrusions, there is a danger that the individual will be *repeatedly* subjected to such intrusion. *See* Pet. App. at 117a n.15 (trial court noted that the statute authorizing sobriety checkpoint programs in this case might subject motorists to repeated checkpoint stops, even on the same trip as they passed from locality to locality). Indeed, random search or seizure programs are

[4] *Compare Skinner v. Railway Labor Executives' Ass'n, supra* (search prompted by individual's involvement in accident); *National Treasury Employees Union v. von Raab, supra* (search prompted by individual's beginning new, safety-sensitive job). *Cf. Almeida-Sanchez v. United States, supra*, 413 U.S. at 272-273 (contrasting search prompted by driver's crossing of international border, where he can "'reasonably [be] requir[ed] . . . to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in,'" and driver lawfully driving within the country in an unexceptional manner) (quoting *Carroll v. United States*, 267 U.S. 132, 154 (1925)).

often intentionally designed to *assure* repetition as a means of maximizing deterrent effect.[5]

While these potential increases in the intrusiveness of random searches and seizures may remain within tolerable limits where the intrusiveness of each search or seizure is *truly minimal*, that *cannot* be said where each —literally arbitrary and potentially repetitive—intrusion rises to some level of significance. The prospect of the government randomly removing individuals from their normal and lawful day-to-day rounds, so that those individuals may be suddenly—and potentially repeatedly—subjected to *substantial* intrusions into their privacy and dignity is simply not consistent with the Constitution's vision of a free society.

E. The concept of a "minimal intrusion" is not self defined. Assessing whether a particular level of intrusion is "minimal," requires a referent: those "expectation[s] of privacy" that our society "is prepared to recognize as legitimate." *New Jersey v. T.L.O., supra*, 469 U.S. at 338. That assessment must begin with an examination of the normal expectations of privacy—and the normal restrictions on those expectations—associated with a certain activity. Where an activity is well-understood to be subject to certain state restrictions on personal freedom and privacy, and those restrictions are well-accepted by the society, the individuals who engage in the activity have reasonable expectations of privacy that are to that

[5] Employee urine collection drug testing programs are illustrative. In virtually all of the federal random testing programs, *see* n.1, *supra*, employees are subjected to a permanent regime of repeated testing designed to continue throughout their work lives, no matter how often they have taken the test and passed; employees who find the experience embarrassing and distasteful are thus required to reexperience it innumerable times, each time on a random basis. In contrast, in the *Skinner* post-accident testing program and the *von Raab* pre-employment testing program, tests were required only upon the occurrence of a rare event making repetition highly unlikely.

extent—albeit *only* to that extent—reduced. *See, e.g., Skinner v. Railway Labor Executives' Ass'n, supra,* 57 U.S.L.W. at 4330, 4331 (assessing reasonable expectations of privacy of railroad workers in light of long-standing restrictions on their privacy); *New Jersey v. T.L.O., supra,* 469 U.S. at 338-339 (school children); *O'Connor v. Ortega, supra,* 480 U.S. at 721-722 (government employees).

Clearly an individual's reasonable privacy expectations when driving are more limited than in certain other contexts, *e.g.*, when at home. *South Dakota v. Opperman,* 428 U.S. 364, 367-369 (1976). And, accordingly, an intrusion that might be deemed "significant" in the latter context might be deemed "minimal" in the former. Most obviously, driving is a public activity, conducted in public view. Moreover, given the mobility and potential threat to the safety of others inherent in automobile travel, our society has imposed a number of limitations on drivers' freedom of movement and privacy. To note but a few examples, drivers are subject to well-accepted and long-standing licensing requirements, vehicle inspection requirements, and myriad rules of the road restricting their freedom of movement. *Id.*

On the other hand, as countless cases in this Court demonstrate, motorists in our society retain broad and well-accepted expectations of privacy that the state has never been permitted to invade. *See, e.g., Delaware v. Prouse, supra*; *United States v. Ortiz, supra*; *Almeida-Sanchez v. United States, supra.* This balance of expectations of privacy and of accepted limitations on privacy thus forms the context for assessing the degree to which a given search or seizure represents a "significant" or a "minimal" intrusion on a driver's reasonable privacy expectations.

The proper approach is thus clear, even if it does not necessarily yield its results with mechanical precision. Assessments of the seriousness of an intrusion must be

firmly rooted in current social reality, reflecting the generally accepted privacy expectations of citizens in a free society as they go about the rounds of their day-to-day activities.

III. Reviewing Highway Sobriety Checkpoint Programs To Assure That They Impose No More Than Minimal Intrusions

A. There has now been sufficient litigation on the constitutional validity of highway sobriety checkpoint programs—and similar random automobile stop programs—to give substantial guidance on the meaning of "minimal intrusion" in this context. A review of the cases reveal that a number of restrictions on government discretion have been almost universally viewed as essential to their constitutionality.

First, it is clear that random, suspicionless automobile checkpoint programs only meet the Constitution's requirements where the program assures that objective intrusions will be confined to *momentary stops accompanied by unthreatening verbal inquiries and the most casual visual examination. Compare United States v. Martinez-Fuerte, supra,* 428 U.S. at 558 (upholding auto checkpoint stop involving "only a brief detention"); *Commonwealth v. Trumble,* 483 N.E. 2d 1102, 1105 (Mass. 1985) (upholding auto checkpoint stop of less than one minute); *State v. Superior Court,* 691 P.2d 1073, 1077 (Ariz. 1984) (same); *with United States v. Ortiz, supra,* 422 U.S. at 894 (refusing to uphold random car searches, as distinct from brief stops, because of "the invasion of privacy that a search entails"); *People v. Scott,* 473 N.E. 2d 1, 2 (NY 1984) (police checkpoints may randomly stop cars for brief questioning but may *not* randomly administer sobriety tests); *Patchoque-Medford Teachers Cong. v. Board of Educ.,* 510 N.E. 2d 325, 331 (NY 1987) (at auto checkpoint "police could only stop and inquire but could not give sobriety tests" without reasonable suspicion of intoxication). *See generally* Jacobs & Strossen,

Mass Investigations Without Individualized Suspicion, 18 U.C. Davis L.R. 595, 672 (1985) (noting the extreme brevity of checkpoint stops that have been approved).

Indeed, more than 60 years ago, this Court rejected the proposition that automobile checkpoints could be used to accomplish searches entailing significant intrusions on persons. *See Carroll v. United States*, 267 U.S. 132, 153-154 (1925) ("It would be intolerable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor, and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search.")

Second, the case law establishes too that the process of selecting individuals for stops must be an *entirely objective process*, wholly removed from the discretion of officers in the field, *Delaware v. Prouse*, *supra*, that the program *must not "single out" individuals from the general population of drivers*, and that the state must make the routine nature of the stop manifest and avoid any action that would be perceived as harassing. *See United States v. Ortiz*, *supra*, 422 U.S. at 894-895 (ability to see that others are also subject to a search makes one "much less likely to be frightened or annoyed by the intrusion"; where "only a few are singled out . . . [they] may find the searches especially offensive"). *See also United States v. Maxwell*, 565 F.2d 596, 598 (9th Cir. 1977) (auto stop invalid where cars cannot perceive routine nature of stops); *Stark v. Perpich*, 590 F.Supp. 1057, 1061 (D. Minn. 1984) (drivers at routine stops must be told of routine nature of stop).

Third, most of those state courts that have upheld sobriety checkpoint stops have done so only after imposing a number of additional, carefully considered limitations to assure that the checkpoints' operations reduce, as far as possible, such subjective intrusions as surprise, confusion, and annoyance to a minimal level. *See, e.g.*,

Webb v. State, 739 S.W.2d 802 (Tex. Cr. App. 1987) (police at checkpoint must avoid causing traffic congestion and thus prolonging detention; they must also make their authority and purpose clear to all drivers); *Commonwealth v. Amaral*, 495 N.E.2d 276 (Mass. 1986) (police checkpoint must be conducted at a well-lit location and must provide warning signs to prevent surprise and sufficient space for cars comfortably to pull over); *State v. Deskins*, 673 P.2d 1174, 1185 (Kan. 1983) (listing numerous factors that will be examined in evaluating intrusiveness of a checkpoint); *State v. Hilleshiem*, 291 N.W. 2d 314 (Iowa 1980) (same).

Only because most random sobriety checkpoint programs have contained these sets of safeguards has the prevailing view been that they meet constitutional muster. These safeguards, at a minimum, should be viewed as essential to any characterization of such programs as minimally intrusive. In deciding this case, this Court should demand no less.

B. Many of the inquiries conducted by the trial court are in accord with the approach just described. *See* Pet. App. 104a (all stops of very short duration); *id.* at 111a (no discretion regarding selection of motorists for stops); *id.* at 112a-113a (official discretion limited in numerous other ways); *id.* at 107a-108a (advance warning to motorists provided in order to reduce surprise and confusion). On the other hand, a number of the trial court's inquiries reflect a view of "minimal intrusion" that has less uniform support in the decisions of other courts. *See id.* at 105a-110a (significant intrusion because motorists did not know of exact location of checkpoint and did not know of right to turn around to avoid checkpoint once seeing it); *id.* at 115a (significant intrusion because checkpoint's purpose involved "search for violators of criminal law"). On these latter bases the trial court found the checkpoint program unconstitutional.

For the reasons stated at the outset, the AFL-CIO takes no position on the correctness of the *particular* judgments made by the trial court—and upheld by the Court of Appeals, Pet. App. 20a-21a—regarding the intrusiveness of this checkpoint program. And, thus, the AFL-CIO supports neither party in this case. Rather, it is our submission that Fourth Amendment law clearly does mandate that this Court, in assessing this program, inquire into whether its intrusiveness into personal privacy in any respects exceeds minimal levels, and that this Court find the program unconstitutional if it finds that the program does entail any such intrusions.

CONCLUSION

For the foregoing reasons this Court should determine whether the program in question entails any intrusions into personal dignity or privacy interests beyond a truly minimal level, and should reject the program as unconstitutional if it entails any intrusions beyond that level.

Respectfully submitted,

WALTER KAMIAT
LAURENCE GOLD
(Counsel of Record)
815 16th Street N.W.
Washington, D.C. 20006
(202) 637-5340